terest will be bound by a decree,[13] provided he is represented by some one whose interests are really identical with his own.[14] The decree of sale must provide for the preservation of the interests of those entitled to take under the will by substituting the fund for the land.[15]

The *Coquillard* cases gave an excellent opportunity for the application of the doctrine of representation. The residuary clause of the will carried over to the testator's wife and two sons a vested determinable estate in fee,[16] subject to be divested on the birth of a child to either of the sons. Hence, all parties *in esse* who had any interest in the estate were before the court, and they fairly represented the interests of the remaindermen not *in esse*. In order to preserve the interests of all parties, it was necessary to decree a sale of the realty. The decree, by substituting the fund realized from the sale of the land for the land itself, followed the wish of the testator as nearly as possible. The case illustrates very well how the doctrine of representation, by doing away with the inconvenience of keeping estates tied up, works substantial justice to all concerned.

SEPARATE OWNERSHIP OF SURFACE OF LAND AND MINERALS UNDER IT.—While the original owner of the fee to land owns from the clouds to the centre of the earth, he may subdivide his property in any way

[13]Hale *v.* Hale (1893) 146 Ill. 227, 256, 33 N. E. 858; Kent *v.* Church of St. Michael (1892) 136 N. Y. 10, 32 N. E. 704; Ridley *v.* Halliday, *supra*. Since a conversion of the realty into personalty is in violation of the testator's wish, the court will not make such a decree merely for the benefit of the parties, but only where it appears necessary in order to preserve the estate from destruction. Thompson *v.* Adams (1903) 205 Ill. 552, 69 N. E. 1; Mayall *v.* Mayall, *supra*. While there seems to be no real distinction between a remainder contingent on the happening of an event and one uncertain as to the persons ultimately entitled to enjoyment, see 14 Columbia Law Rev. 66, in this case such a distinction seems necessary, for contingent remaindermen *in esse* can be brought before the court, while those *in posse*, of course, cannot.

[14]Downey *v.* Seib (1906) 185 N. Y. 427, 78 N. E. 66; Chaffin *v.* Hull (C. C. 1892) 49 Fed. 524; Smith *v.* McWhorter (1905) 123 Ga. 287, 51 S. E. 474.

[15]Monarque *v.* Monarque (1880) 80 N. Y. 320; Ruggles *v.* Tyson (1889) 104 Wis. 500, 79 N. W. 766; Bofil *v.* Fisher (S. C. 1850) 3 Rich. Eq. 1.

[16]Under the old common law, where, as in this case, A devised to B for life with contingent remainder in fee to B's unborn children, the fee was said to be in abeyance or *in nubibus*. 2 Bl. Comm. *107. But it is now generally considered that the fee remains in the grantor as a vested estate, determinable on the happening of the contingency, 4 Kent, Comm. *258 *et seq.*, and passes under a residuary clause. Egerton *v.* Massey (1857) 3 C. B. (N. S.) *338. It may be termed a quasi-reversion while retained by the grantor, but when devised in a residuary clause, it is more correctly called a determinable fee, as in Coquillard *v.* Coquillard. At any rate, whether disposed of or not by the grantor, it is a vested interest. Although in 2 Reeves, Real Property, 1140, footnote 6, and in Chaplin, Suspension of the Power of Alienation (2nd. ed.) § 308, the authors speak of a contingent reversion, citing Floyd *v.* Carow (1882) 88 N. Y. 560, the court there, in using the word "contingent", apparently means by it an estate on condition subsequent, which is of course "contingent" in one sense; it is really what has been here termed a quasi-reversion.

he chooses, by horizontal as well as by vertical planes.[1] Thus he may convey the underlying minerals separately from the surface of the land, and, in that event, the owner of the minerals and the owner of the surface are not co-tenants or joint-tenants in a common property, but owners in severalty of distinct estates.[2] The mineral estate is subject to separate taxation[3] and capable of being made the subject of ejectment.[4] Nor does the presumption that the party having possession of the surface also has possession of the subsoil exist when the rights have been thus severed.[5] This was recognized in the recent case of *Northcut* v. *Church* (Tenn. 1916) 188 S. W. 220. Plaintiffs' grantor had held adverse possession of the surface for more than the statutory period, but had conveyed the minerals to plaintiffs within the period, and the latter had never taken actual possession. The court held that plaintiffs had acquired no title, since possession of the surface by one who has conveyed to another the underlying minerals in place does not inure to the latter's benefit.

The mining rights may constitute a distinct estate in the land—a conveyance or lease—or they may be a mere incorporeal right in the land of another. Neither the form of the instrument creating the right nor the term the parties themselves have given to the transaction is necessarily decisive of this question; the instrument must be construed as a whole in order to ascertain the intent of the parties.[6] If the intent is to grant the coal itself or the right to remove the whole of it, so that nothing will be left for the reversion, there is a sale or conveyance of the coal,[7] even though the parties have called it a lease,[8] agreed on a

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[1]See Kemmerer *v.* Midland Oil & Drilling Co. (8 C. C. A. 1915) 229 Fed. 872.

[2]Virginia Coal & Iron Co. *v.* Kelly (1896) 93 Va. 332, 24 S. E. 1020; Hutchinson *v.* Kline (1901) 199 Pa. 564, 49 Atl. 312.

[3]*In re* Major (1890) 134 Ill. 19, 24 N. E. 973; Millard *v.* Delaware, Lackawanna & Western R. R. (1913) 240 Pa. 234, 87 Atl. 601.

[4]Comyn *v.* Kyneto (1606) Cro. Jac. 150; see New Jersey Zinc Co. *v.* New Jersey Franklinite Co. (1861) 13 N. J. Eq. 322, 342.

[5]See 11 Columbia Law Rev. 672. The English courts at one time had some difficulty in conceiving of a corporeal interest in an unopened mine separate from the ownership of the surface, for they regarded livery of seisin as essential to the conveyance of land, and livery could not be made of an unopened mine. Sheppard's Touchstone *96; see Caldwell *v.* Fulton (1858) 31 Pa. 475, 482; Outlaw *v.* Gray (1913) 163 N. C. 325, 79 S. E. 676. But such a separate estate in the minerals may now be created by deed, either by an exception of the surface or by a grant of the mine. See Williams *v.* South Pa. Oil Co. (1903) 52 W. Va. 181, 43 S. E. 214. In either case, the right to the minerals carries with it the right of access to them and the right to occupy so much of the surface as is reasonably necessary to the profitable and beneficial enjoyment of the property. Marvin *v.* Brewster Iron Mining Co. (1874) 55 N. Y. 538; Williams *v.* Gibson (1888) 84 Ala. 228, 4 So. 350; see Turner *v.* Reynolds (1854) 23 Pa. 199. In Chartiers Block Coal Co. *v.* Mellon (1893) 152 Pa. 286, 25 Atl. 597, it was held that the owner of the surface had a right of access through the coal he had conveyed to the underlying rock strata which he had retained. On the other hand, the mine-owner is bound to leave sufficient support for the surface. 16 Columbia Law Rev. 611.

[6]Delaware, Lackawanna & Western R. R. *v.* Sanderson (1885) 109 Pa. 583, 1 Atl. 394.

[7]Sanderson *v.* City of Scranton (1884) 105 Pa. 469.

[8]Delaware, Lackawanna & Western R. R. *v.* Sanderson, *supra.*

price to be paid by the ton as the coal is taken out,[9] or prescribed a certain period within which the mineral is to be removed.[10] In a lease also, there must be an intention on the part of the lessor to divest himself of possession and to confer it upon the lessee for the term named.[11] But one who has a mere license to mine on the land of another has no permanent interest in the land itself, but only in the proceeds as personal property, and his possession is the possession of the owner of the land.[12]

Oil and gas leases are somewhat peculiar in their form and construction because of the fact that oil and gas, unlike other minerals, do not remain fixed in place, but move about within the earth. As the oil and gas may be drawn out from under the land through the wells of an adjoining landowner, it has been said that one can have no absolute ownership of these substances without reducing them to possession.[13] All that the landowner has is the right to do what may be done on his land to reduce them to possession, and hence he cannot grant any more than this right to prospect and explore for the oil and gas.[14] On the other hand, it is argued that the possibility of the escape of these minerals ought not to render them while in place incapable of conveyance.[15] Such leases are construed so as to encourage the development of the mineral wealth of the country,[16] and, because of the danger of loss to the owner from drainage to surrounding wells, are

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[9]Hosack v. Crill (1902) 204 Pa. 97, 53 Atl. 640; Manning *v.* Frazier (1880) 96 Ill. 279.

[10]Plummer *v.* Hillside Coal & Iron Co. (1894) 160 Pa. 483, 28 Atl. 853.

[11]Paul *v.* Cragnaz (1900) 25 Nev. 293, 59 Pac. 857. One test is whether the grantee acquires an estate in the land sufficient to support an action of ejectment. Bainbridge, Mines & Minerals (5th ed.) 280.

[12]Wheeler *v.* West (1886) 71 Cal. 126, 11 Pac. 871. There is clearly nothing more than a license where the right to mine is for a limited purpose or where it does not exclude a similar right in the landowner. Gloninger *v.* Franklin Coal Co. (1867) 55 Pa. 9; Ryckman *v.* Gillis (1874) 57 N. Y. 68. The grant of a license to mine may be in the form of a quitclaim deed. Baker *v.* Clark (1900) 128 Cal. 181, 60 Pac. 677. Such a right, unlike a distinct right of property in the mines, is indivisible, because a division of the right would create new rights and prejudice the owner of the soil. Lord Mountjoy & the Earl of Huntington's Case (1583) Godb. 17; see Hughes *v.* Devlin (1863) 23 Cal. 502.

[13]Heller *v.* Dailey (1902) 28 Ind. App. 555, 63 N. E. 490.

[14]See Heller *v.* Dailey, *supra;* Federal Oil Co. *v.* Western Oil Co. (C. C. 1902) 112 Fed. 373; Frank Oil Co. *v.* Belleview Gas & Oil Co. (1911) 29 Okla. 719, 119 Pac. 260.

[15]See Texas Co. *v.* Daugherty (Tex. 1915) 176 S. W. 717; Preston *v.* White (1905) 57 W. Va. 278, 50 S. E. 236. Though a mere license is not taxable as realty, *cf.* Board of Supervisors of Hancock County *v.* Imperial Naval Stores Co. (1908) 93 Miss. 822, 47 So. 177, an oil lease is. Texas Co. *v.* Daugherty, *supra;* People *ex rel.* Carrell *v.* Bell (1908) 237 Ill. 332, 86 N. E. 593. But it seems the lessee cannot maintain ejectment. See Watford Oil & Gas Co. *v.* Shipman (1908) 233 Ill. 9, 84 N. E. 53.

[16]Parish Fork Oil Co. *v.* Bridgewater Gas Co. (1902) 51 W. Va. 583, 42 S. E. 655. This is especially true where the only consideration for the lease is the prospective royalties, for a lessee who has paid nothing should not be allowed to hold the lease merely for speculative purposes. See Huggins *v.* Daley (4 C. C. A. 1900) 99 Fed. 606.

construed more strongly against the lessee and in favor of the lessor.[17] Another example of this tendency appears in the recent case of *Pierce Fordyce Oil Ass'n.* v. *Woodrum* (Tex. Civ. App. 1916) 188 S. W. 245. The defendant, who had secured an assignment from the lessee under such an instrument, claimed that it was a conveyance, and that, as a subsequent vendee, he was not bound by the covenant to pay rent, which did not run with the land. But the court, favoring the lessor, held that the instrument was a lease, not a conveyance, and that the defendant, as assignee, was bound for the payment of the rent provided for in the original contract.

[17]Superior Oil & Gas Co. *v.* Mehlin (1910) 25 Okla. 809, 108 Pac. 545; Costigan, American Mining Law, 477.